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No. 01-394

IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, *et al.*,
Petitioners,

v.

JENNIFER K. HARBURY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant review of the decision of the D.C. Circuit where the decision below does not conflict with any decision of any other court of appeals or this Court?

2. Whether review is warranted where the decision of the court below represents a straightforward application of well-settled law?

3. Whether this Court should grant review given that no issue of national importance is implicated?

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No. 01-394

IN THE

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JENNIFER K. HARBURY,

Respondent.

BRIEF IN OPPOSITION

INTRODUCTION

Respondent Jennifer K. Harbury respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed by the individual petitioners.

There is no compelling reason to review the decision below. Sup. Ct. R. 10. First, the decision of the court below is utterly unremarkable. That court merely held, consistent with every other court to consider the issue – including the Second, Fifth, Sixth, Seventh and Ninth Circuits – that the constitutional right of access to courts is violated when a government official deliberately engages in a cover-up for the very purpose of preventing a litigant from filing suit. Petitioners point to no decision of this Court or of any lower court that is in tension with that holding.

Nor is there a circuit split on any question presented by this case. Although petitioners attempt to manufacture a split by claiming that the D.C. Circuit eliminated an "exhaustion" requirement, that is a plain misrepresentation of the court's opinion. Indeed, the court itself expressly endorsed the general exhaustion requirement, Pet. App. 23a-24a, and held only – consistent with the very cases on which petitioners purport to rely – that exhaustion is not necessary in the narrow category of cases in which resort to state court would necessarily be futile. Petitioners' second purported split fares no better. No court has ever concluded that something more than a deliberate deception designed to deny a plaintiff her constitutional right to access the courts is needed to state a claim and, indeed, the cases on which petitioners themselves rely involve just such conduct.

The D.C. Circuit's analysis of qualified immunity was also consistent with this Court's precedent. The D.C. Circuit, as it was required to do, found that at the time of the events in question there was a clear consensus of cases of persuasive authority holding that a government official may not abridge the right of access to the courts by engaging in a deliberate cover-up. Although petitioners rehash their "exhaustion" argument in an attempt to demonstrate that the law is unsettled, their argument is wrong. The law is clear. In any event, whether state court review is required as a prerequisite to bringing an access to courts claim is not relevant to the qualified immunity analysis, which concerns only the lawfulness of the underlying government official *conduct* – not the procedural requirements imposed on a plaintiff challenging such conduct.

There is no other compelling reason to grant review in this case. Although the petitioners suggest that the D.C. Circuit's

holding would impede U.S. foreign policy and intelligence efforts, their concern is not shared by the Solicitor General, who declined to file a brief in support of the petitioners at this stage of the proceedings. In any event, the decision below will have no adverse impact at all. As the D.C. Circuit made clear, the holding below is limited to a narrow subset of cases in which government officials not only refuse to answer questions but in fact affirmatively deceive citizens – and do so for the very purpose of preventing the filing of a lawsuit.

Finally, review in this case would be premature. The District Court still has pending before it a number of common law tort claims arising out of the same set of facts and circumstances on which jurisdictional discovery is currently proceeding. Moreover, as the petitioners have yet to answer the complaint, they have not yet asserted any defenses, such as national security, that may be available to them.

STATEMENT OF THE CASE

Jennifer Harbury brought this lawsuit in 1996 against the State Department, the National Security Council, and the Central Intelligence Agency, as well as several named and unnamed officials of those agencies. Ms. Harbury brought this lawsuit on her own behalf and as administratix of the estate of her late husband, Efrain Bamaca-Velasquez. In the lawsuit, Ms. Harbury alleged a series of constitutional torts pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Ms. Harbury also alleged a number of common law torts against the defendants.

Because this case comes to the Court on a motion to dismiss, the allegations in Ms. Harbury's complaint are taken to be true. Ms. Harbury, an American citizen, married Mr.

Bamaca, a Mayan citizen of Guatemala, in 1991. On or about March 12, 1992, he disappeared in the southwestern region of his homeland. The Guatemalan Army reported at the time that Mr. Bamaca had committed suicide during a skirmish between government and rebel troops and had been buried nearby. *Harbury v. Deutch*, Pet. App. 2a-3a. In fact, Mr. Bamaca had been captured alive and secretly detained by members of the Guatemalan military. *Id.* at 3a. Within a week of his capture, the CIA informed both State Department and NSC officials that the Guatemalan military would likely fabricate his combat death in order to maximize its ability to obtain information from him. *Id.* at 6a.

In early 1993, Ms. Harbury learned from an eyewitness that her husband was in fact alive, but that he was being secretly detained and tortured by the Guatemalan military. *Id.* at 3a. Ms. Harbury immediately contacted State Department officials, including several of the petitioners, provided these officials with the information she had learned, and asked them to provide her with information about Mr. Bamaca's status. *Id.* These officials promised to look into the matter and to assist her. *Id.* Although they were already aware of the earlier CIA report indicating that Mr. Bamaca was still alive, they told her that they had no information. *Id.* at 6a.

In August 1993, Ms. Harbury was granted permission to open the grave which purportedly held Mr. Bamaca's remains. However, just as the eyewitness had reported to her, the body in the grave was not that of her husband. *Id.* at 3a. Ms. Harbury immediately informed petitioner Marilyn McAfee, the U.S. Ambassador to Guatemala, who promised to investigate the matter and to report back her findings. *Id.* Ms. McAfee, like the other State Department petitioners, also was aware of the CIA report concerning Mr. Bamaca. *Id.* at 6a. However,

she too told Ms. Harbury that she knew nothing of his fate. *Id.*

From October 1993 to October 1994, Ms. Harbury continued to meet with various State Department officials, including additional petitioners. *Id.* at 3a. By then the petitioners had received additional reports about Mr. Bamaca, including reports of his extra-judicial execution. *Id.* at 6a. However, they still informed Ms. Harbury that they had no information, repeated their concern, and promised to look into the matter further. *Id.* at 3a-4a.

In October of 1994, the CBS news program "60 Minutes" reported that the U.S. Embassy in Guatemala in fact possessed an intelligence report confirming that Mr. Bamaca had been captured alive. *Id.* at 4a. As a result, the State Department publically confirmed the CBS report, but insisted that it did not know whether Mr. Bamaca remained alive. *Id.* Ms. Harbury then met with petitioner Anthony Lake, the National Security Advisor, who told her that the Government had "scraped the bottom of the barrel" for information about her husband and that no further information existed. Mr. Lake promised he would keep Ms. Harbury informed if he learned of further information, as did other State Department and NSC officials with whom Ms. Harbury met. None of these officials provided her with any other information. *Id.* Suspecting that the government officials with whom she had met were not being truthful, Ms. Harbury then filed a Freedom of Information Act request. *Id.* No documents were initially provided to her. *Id.*

In March 1995, Congressman Robert Torricelli publically announced that Mr. Bamaca had been killed on the orders of a paid CIA asset. *Id.* at 4a-5a. Ms. Harbury later learned, through documents provided to her in response to her FOIA request, that prior to his death Mr. Bamaca had been captured

and secretly detained by members of the Guatemalan security forces who were also acting as paid CIA assets. *Id.* at 5a. For approximately 18 months, Ms. Harbury learned, Mr. Bamaca had been tortured by those security forces in order to obtain information about the Guatemalan resistance for the benefit of the CIA. *Id.* at 3a. Ms. Harbury further learned that State Department and NSC officials, including the petitioners, had known from the very outset that Mr. Bamaca was alive and being tortured. *Id.* at 5a-6a.

Ms. Harbury then brought this lawsuit against the petitioners, raising several categories of claims. First, Ms. Harbury claimed that the CIA defendants violated her husband's Fifth Amendment substantive due process rights by conspiring to bring about his imprisonment, torture and execution. Second, Ms. Harbury claimed that the petitioners violated her constitutional right of access to the courts by deliberately misleading her into thinking that no information existed about the fate of Mr. Bamaca, thereby preventing her from taking the legal action necessary in order to save his life. Had the petitioners not deceived her by telling her that they had sought information about her husband's fate and that no additional information existed, Ms. Harbury alleged, she would have filed her FOIA request much sooner, learned of the Government's complicity in Mr. Bamaca's kidnaping and torture prior to the time of his execution, and sought injunctive relief in order to save his life. Mr. Bamaca is now dead, and injunctive relief is permanently foreclosed. Third, Ms. Harbury claimed that all three sets of defendants violated Ms. Harbury's right of familial association by conspiring to end the life of her husband and by interfering with her efforts to investigate her husband's disappearance. Finally, Ms. Harbury asserted a variety of common law torts against the defendants, including intentional infliction of emotional distress, negligent

supervision, and intentional and negligent misrepresentation.

In March 1999, the District Court dismissed all of Ms. Harbury's constitutional claims, Pet. App. 30a, entering final judgment on this decision in August of that year. *Id.* at 60a. With respect to Mr. Bamaca's due process claim, the court held that as a foreign national residing in a foreign country, Mr. Bamaca was not entitled to Fifth Amendment substantive due process protections. *Id.* at 36a-43a. With respect to Ms. Harbury's access to courts claim, the court held that Ms. Harbury could not bring such a claim because she had not attempted to seek a state court remedy first, and even if she had the defendants would be entitled to qualified immunity. *Id.* at 43a-49a. With respect to Ms. Harbury's claim based on her right of familial association, the court held that Ms. Harbury had not stated a claim because she had not alleged that the defendants directly targeted her relationship with Mr. Bamaca by their actions. *Id.* at 52a. Ms. Harbury's common law tort claims remain pending before the District Court.

On appeal, the D.C. Circuit upheld the District Court's dismissal of Mr. Bamaca's substantive due process claim and Ms. Harbury's familial association claim. *Id.* at 1a. With respect to Mr. Bamaca's Fifth Amendment due process claim, the court held that the case was governed by *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in which the Supreme Court had found that the warrantless search and seizure of an alien's property in Mexico did not violate the Fourth Amendment. Pet. App. 12a. With respect to Ms. Harbury's familial association claim, the court observed that this Court has found a constitutional right to continuing association with family members only where there is an allegation of direct and purposeful government conduct. *Id.* at 18a-19a (citing *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Santosky v. Kramer*, 455

U.S. 745 (1982)). The court also agreed with its sister circuits that the constitutional right to familial association protects only the parent-child relationship, and not the marital relationship. *Id.* at 18a-20a (citing *Valdivies Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986)).

The D.C. Circuit disagreed with the District Court in one respect, however, overturning its decision on the access to courts claim. The court began by noting that the right of access to courts not only protects the ability to get into court, "but also ensures that such access be 'adequate, effective, and meaningful.'" *Id.* at 21a (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). The court then observed that there was a uniform consensus in the circuit courts, developed over nearly two decades of litigation, that a government cover-up can form the basis for an access to courts claim. *Id.* at 21a-22a (citing *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986); *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995); *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997); *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998)).

The court then concluded that Ms. Harbury had pled a violation of the constitutional right of access to the courts. The court rejected the argument that her claim was insufficient because she had not first attempted to bring a state court claim. Although a plaintiff would normally have to demonstrate that her right of access was harmed by showing what actually happened in a state court proceeding, the court reasoned that such a prerequisite is unnecessary in the limited number of cases in which bringing such a proceeding would necessarily be "futile." *Id.* at 26a (citing *Swekel v. River Rouge*, 119 F.3d 1259, 1264 n.2 (6th Cir. 1997)). The court recognized that this

was such a case: as the court observed, by the time Ms. Harbury learned of the Government's complicity in her husband's imprisonment and torture, it was too late for her to take effective legal action to save his life – Mr. Bamaca was already dead. *Id.* at 24a-25a. With respect to the petitioners' claim of qualified immunity, the court emphasized that Ms. Harbury had pled that the petitioners engaged in this deception for the express purpose of preventing Ms. Harbury from filing legal action in the first place. *Id.* at 27a. Given that every circuit court to consider the issue had concluded that the constitution is violated in such circumstances, the court held that it was "obvious" that public officials may not affirmatively mislead citizens in order to protect themselves from legal liability. *Id.* at 28a.

The defendants below filed timely motions for Rehearing and for Rehearing En Banc, each of which was denied. In the Order accompanying the denial of the Petition for Rehearing, the D.C. Circuit responded directly to several of the arguments petitioners again advance here. In particular, the court explained that the defendants misstated the scope of the court's holding. "[T]he opinion will not open the courts to a flood of constitutional access to courts claims," the court explained, because the holding itself is very narrow. Pet. App. 61a-62a. The court emphasized that its holding applied only to situations where, as alleged by Ms. Harbury, "defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit." *Id.* at 62a (emphasis in original). Moreover, the court noted, it had adopted the "general requirement" that a "plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief." *Id.* Ms. Harbury's claim was permitted to advance, the court explained, only because, if the facts she pled are correct, "defendants' actions

'completely foreclosed' one of her primary avenues of relief." *Id.* (internal citation omitted).[1] The court also noted that the opinion was limited to cases, like Ms. Harbury's, in which "most of the essential facts" of a cause of action were hidden. *Id.* (internal quotation omitted). Thus, it did not apply to cases in which a prospective plaintiff, while still lacking some information, was at least aware of enough facts with which she could *initiate* legal action. Finally, in response to the assertion that the holding below would negatively affect national security, the court made clear that "the Government never claimed, either before the district court or the panel, that the cover-up alleged by Harbury was necessary to maintain national security." *Id.* The court noted that the Government remained free to assert a national security defense before the District Court. *Id.*

After the Solicitor General declined to file a Petition for a Writ of Certiorari on behalf of the petitioners, the instant petition was filed.

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[1]The court concluded that Ms. Harbury had specifically stated, in her brief and as amplified at oral argument, that had she learned of her husband's situation while he was still alive she would have immediately sought injunctive relief based on various tort theories. Pet. App. 63a. Although defendants disputed whether such a claim would have been successful, the court observed that on a motion to dismiss, Ms. Harbury was entitled to have "any ambiguities or doubts concerning the sufficien[illegible] of the claim . . . be resolved in [her] favor." *Id.* (citing *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985)).

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' ANALYSIS OF THE UNDERLYING CONSTITUTIONAL CLAIM IS COMPLETELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

In this case the court below held, consistent with *every* court of appeals to have considered the question, that the constitutional right of access to courts is violated when "public officials affirmatively mislead citizens in order to prevent them from filing suit." Pet. App. 28a; *see Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("[The right of access] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress"); *Ryland v. Shapiro*, 708 F.2d 967, 973-75 (5th Cir. 1983) (A litigant's right is prejudiced by "[c]onduct by state officers which results in delay in the prosecution of an action in state court"); *Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively."); *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995) ("[W]hen police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged."); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) ("[I]f a party engages in actions that effectively cover-up evidence . . . they have violated his right of access to the courts."); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) ("[T]he Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which

effectively covers-up evidence."). This unremarkable holding in no way diverges from any precedent of this Court.

Given that every circuit court of appeals to have considered the question has reached the same conclusion, petitioners are forced to assert that the Court should grant certiorari "to review the entire direction of lower court decisions in this area. . . ." Pet. at 18. But there is plainly no need for such sweeping review. These courts have merely recognized, consistent with this Court's precedent, that "government cover-ups can infringe the right of access to courts." Pet. App. 21a. Such a rule is entirely consistent with this Court's holding that the right of access not only guarantees physical access to the court, but also ensures that such access be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

Petitioners nonetheless assert that this entire line of cases conflicts with the limits on the right of access to courts set forth in *Lewis v. Casey*, 518 U.S. 343 (1996).[2] That assertion is meritless. In *Casey*, the Court overturned a lengthy district court injunction aimed at reforming a prison's legal system, holding (on standing grounds) that the injunction went far beyond what was necessary to cure the actual harm documented by the court. 518 U.S. at 357-60. In doing so, the Court observed that a cognizable injury could not be shown by the mere fact that the prison legal system failed to affirmatively assist prisoners in discovering grievances or to litigate them effectively in court. *Id.* at 354. Such a requirement, the Court observed, would be tantamount to requiring "permanent provision of counsel." *Id.*

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[2]Petitioners identify this case, mistakenly, as *Lewis v. Fletcher*. Pet. at 16.

But none of the myriad cases petitioners ask this Court to overturn rely on the premise that a constitutional right is violated when a government official fails to provide information that would aid in the prosecution of a claim. Instead, these cases make clear that the constitutional right of access to courts is violated when government officials affirmatively *cover up* relevant information for the purpose of preventing a plaintiff from seeking judicial redress. *See* Pet. App. 27a. ("Harbury alleges not that defendants violated an affirmative duty to provide information, but that they affirmatively misled her . . . Furthermore, defendants misled her, she alleged, precisely *because* they feared that if they gave her accurate information about Bamaca's fate, she might sue them.") (emphasis in original); *see also Bell*, 746 F.2d at 1261 ("[The right of access] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress"); *Vasquez*, 60 F.3d at 328 ("[W]hen police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged."). *Lewis v. Casey* is simply inapposite.

Petitioners' argument that this entire line of cases conflicts with this Court's procedural due process jurisprudence fares no better. This argument fails to recognize that Ms. Harbury is asserting a violation of a *substantive* constitutional right – and one that has been recognized by this Court throughout a century of jurisprudence. *See Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force . . . It is one of the highest and most essential privileges of citizenship"); *Bounds*, 430 U.S. at 822. The cases cited by petitioners, by contrast, concern only whether property has been taken without adequate procedural

protections. *See Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981) ("Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment *simpliciter* . . . Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law"), *overruled by Daniels v. Williams*, 474 U.S. 327 (1986); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (Respondent asserted that destruction of personal property "deprived him of property without due process"); *Lujan v. G&G Fire Sprinklers, Inc.*, 121 S. Ct. 1446, 1450 (2001) ("we inquire whether the State has deprived the claimant of a protected property interest"). These cases are simply inapplicable.

II. THERE IS NO CIRCUIT SPLIT ON ANY QUESTION PRESENTED IN THIS PETITION

In an effort to make this case appear certworthy, petitioners also attempt to conjure up a split between the circuits on the necessary elements of an unconstitutional deprivation of access to courts claim. As set out below, petitioners fail. In recognizing the claims at issue, the D.C. Circuit merely applied law that is well established, without altering its contours in any way.

1. Petitioners first attempt to manufacture a circuit split in this case by asserting that other circuits have imposed a rigid "exhaustion" requirement, and that the D.C. Circuit eliminated that requirement. *See* Pet. at 19-21, *citing Swekel v. River Rouge*, 119 F.3d 1259 (6th Cir. 1997) and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998). Petitioners misstate the holdings of each of those courts and of the court below.

In both *Swekel* and *Delew*, the Courts of Appeals for the Sixth and Ninth Circuits recognized the non-controversial proposition that, in order to determine whether a government official's action has impeded a plaintiff's ability to seek redress, the plaintiff must typically show that, in fact, her ability to bring a claim has been rendered less effective. *Swekel*, 119 F.3d at 1264 ("Before filing an 'access to courts' claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?"); *Delew*, 143 F.3d at 1222 (plaintiff must show that defendants' conduct "actually render[ed] any state court remedies ineffective"). Thus, *Swekel* and *Delew* indicate that before a plaintiff can state a constitutional claim of denial of access to the courts she must ordinarily attempt, and fail, to obtain an adequate remedy in state courts.

The D.C. Circuit did not reject this general rule. Indeed, in its opinion, the court cited both *Swekel* and *Delew* with approval. Pet. App. 23a-24a. And in its Order denying the Petition for Rehearing, the court reiterated that its opinion "endorses the general requirement that prior to bringing a claim for deprivation of access to courts based on an alleged cover-up, plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief." *Id.* at 62a. As the court observed, however, the actions allegedly taken by the Government in this case did not only prejudice Ms. Harbury's ability to seek adequate relief, they "completely foreclosed" her ability to do so. *Id.* at 25a; *see also id.* at 62a. Specifically, by the time the Government's involvement in her husband's detention came to light, Ms. Harbury's husband was dead, and she was thus unable to seek emergency injunctive relief that could have saved his life. *Id.* at 24a, 62a. The court below sensibly declined to require

plaintiff to file what would have necessarily been a futile state court claim prior to bringing her access to courts claim.[3]

Nothing in that decision conflicts with the decisions of any other court of appeals. Indeed, one of the cases on which petitioners primarily rely – *Swekel* – explicitly acknowledges that the requirement that a plaintiff first attempt to bring a state court claim would not be relevant if such an action would be "completely futile." 119 F.3d at 1264 n.2. *Delew* is even less helpful to the petitioners. There, relying on *Swekel*, the court merely ordered a constitutional right of access claim to be dismissed without prejudice so that a state court action could be initiated first. 143 F.2d at 1223. As no party to that proceeding contended that such a state court action would have been futile, the holding has no relevance here whatsoever.

Petitioners concede, as they must, that in this case, a state court action would be futile. Pet. at 21 ("There is, of course, no doubt that death constitutes a substantial and irreparable harm

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[3]Petitioners' assertion that the court below held that a plaintiff not only has a constitutional "right to access the courts, but he or she can now lay claim to secure a particular and more desirable outcome," Pet. at 20 (emphasis in original omitted), is specious. The court merely held that where the actions of the defendants render a subsequent state court claim futile, a plaintiff is not required to first file such a state court claim. The petitioners do not claim – nor could they – that a remedy exists now that would be adequate given Mr. Bamaca's intervening death.

Any other result would be senseless. Indeed, under petitioners' reasoning, Ms. Harbury would be forced to seek an injunction prohibiting the very thing that has already occurred – her husband's death. Only after a state court denied such injunctive relief – as it would obviously be forced to do given that the request would be moot – could she bring the instant claim. Unsurprisingly, no court has ever suggested that such a nonsensical course of action is necessary.

that cannot be undone by any later proceedings."). The petitioners do not offer any sound justification for requiring the waste of time and judicial resources that the filing and dismissal of a necessarily futile lawsuit would entail. Instead, they attempt to bolster their claim of a circuit split by arguing that their complaint is actually that the decision below would permit access to court claims to proceed any time the plaintiff "could plausibly claim some entitlement to injunctive relief." *Id.* But that is a strawman. The D.C. Circuit did not hold that an access to courts claim can proceed any time a plaintiff could otherwise seek injunctive relief. Instead, the court held only that a plaintiff need not first attempt to file a state court claim if filing such a claim would necessarily be futile. Pet. App. 24a. Such a conclusion is both unremarkable and fully consistent with the decisions of other courts of appeals.

2. Petitioners' second attempt to manufacture a circuit split is equally flawed. Petitioners assert that the D.C. Circuit's conclusion that a claim can be based on the deliberate deception of government officials which was designed to prevent a plaintiff from seeking judicial redress conflicts with two cases in which courts have held that government conduct that is merely misleading cannot form the basis of an access to courts claim. Again, petitioners' claims are simply wrong. Neither of the two cases relied on by petitioners – *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) and *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995) – nor any other case holds that misleading government conduct may not serve as a factual predicate for an access to courts claim.

Indeed, *Bell* itself refutes the petitioners' claim. In that case, the court found several sets of government defendants liable for a violation of the right of access to courts. The first was the police officers who had, in fact, fabricated evidence.

The second set of government officials, however, consisted of detectives who did not have "complete knowledge of what happened the night of the killing," but were "cognizant of glaring inconsistencies and conflicts in [the police officer's] explanation," and in response "facilitated an explanation more favorable to the police department." *Bell*, 746 F.2d at 1262. The *Bell* court also found that the District Attorney – who was aware of the true facts but who nonetheless presented a biased and misleading examination during an inquest into the police officers' conduct – "presented a formidable obstacle to learning the facts and vindicating the [victim's] death." *Id.*; *see also id.* ("the jury could reasonably conclude that the concealment interfered with the Bell family's efforts to seek redress"). Thus, *Bell* plainly does not hold that there must be more than deliberate interference with the right to pursue a claim.

Vasquez similarly offers no support for the petitioners. There, the court merely held that the inadequacy of a police investigation could not constitute a denial of the right of access to the courts because it resulted in only a short delay before the plaintiffs learned the full truth. 60 F.3d at 329. That case rested not on any wrongfulness of the defendants' conduct, but merely on "the magnitude of the injury suffered." *Id.* The case had nothing whatsoever to do with the question of whether deliberate government deception can be the basis for an access to courts claim.

Properly read, *Bell* and *Vasquez* are merely two in a long line of cases to hold that government officials violate the Constitution by interfering with a plaintiff's ability to bring a claim. *See*, *e.g.*, *Ryland*, 708 F.2d at 973 (right to access violated where "agents of the state intentionally engaged in conduct that interfered with [the] exercise of . . . constitutionally protected right to institute a wrongful death

suit"); *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) (right of access violated by "an officially-created impediment to the ability to file an action"); *Swekel*, 119 F.3d at 1262 ("if a party engages in actions that effectively cover-up evidence . . . they have violated his right of access to the courts."). As *Bell* itself makes plain, biased and misleading conduct is often at the heart of such a cover-up. *Bell*, 746 F.2d at 1262.[4]

III. THE COURT OF APPEALS' QUALIFIED IMMUNITY ANALYSIS WAS CONSISTENT WITH SETTLED CASE LAW.

Petitioners also assert that the D.C. Circuit's opinion was inconsistent with this Court's qualified immunity cases. This assertion is baseless. The D.C. Circuit properly found that the contours of the constitutional right to access were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Pet. App. 26a (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

As an initial matter, petitioners complain that, while the law on this point is unsettled, it appears that only controlling authority from the relevant circuit may be considered to

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[4]Petitioners also attempt to bootstrap their purported split by pointing to the fact that Ms. Harbury claimed that keeping her from accessing the courts was *one* (as opposed to the only) of the Government defendant's express objectives. Pet. at 22. Although petitioners now assert that they "might" have been motivated by national security considerations, Pet. at 28, that fact is irrelevant here, as this case comes to the Court on a motion to dismiss. In any event, this argument is difficult to credit given that the Government itself later declassified and provided to Ms. Harbury the very information which would have enabled her to proceed to the courts for emergency relief to save her husband's life.

determine whether a principle of law is clearly established. Pet. at 24.[5] But that is not an accurate statement of the law. To the contrary, this Court has made clear that a plaintiff may either cite to "controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely" *or* identify "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Indeed, as the petitioners themselves concede, this Court has made abundantly clear that it is appropriate for courts to look at precedent outside their own circuit to determine if a principle of law is clearly established. *See* Pet. at 23 (noting that this Court has stated "that a 'court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own [and other relevant] precedents.' *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (quotation omitted; brackets in original)"). That, of course, is precisely what the court below did – it reviewed the case law from other circuits and concluded, based on the clear consensus of other courts, that the relevant principle of law was clearly established.

Petitioners also raise two specific complaints with respect to the D.C. Circuit's qualified immunity analysis.

Petitioners' first critique is that the D.C. Circuit failed to recognize that the law is not clearly established with respect to whether a plaintiff must first press a claim in state court before bringing a constitutional claim based on access to the courts. Pet. at 25. As discussed in detail above, *see supra* at 14-19, no

[5]Although the petitioners complain about the state of the law, they do not ask the Court either in the questions presented or in the body of their Petition to grant review to address the purported confusion. In any event, as explained above, the relevant state of the law is clear.

such circuit split exists. Equally importantly, however, this issue has absolutely nothing to do with qualified immunity. The question to be answered with respect to qualified immunity is whether government officials can reasonably be deemed to be on notice that certain *conduct* is proscribed. Thus, as the D.C. Circuit explained, "[t]he relevant inquiry . . . is this: would an objectively reasonable official have thought it clearly unconstitutional to affirmatively mislead Harbury for the express purpose of preventing her from filing a lawsuit?" Pet. App. 27a. The answer to that question is plainly not dependent on whether a plaintiff has to jump through the procedural hoop of bringing a state court claim before she could bring an access to courts claim. Simply put, even if petitioners were correct with respect to their "exhaustion" argument – and they are not – that would have absolutely no bearing on whether a reasonable government official would understand that the *conduct* that would form the basis for such a claim is forbidden.

Petitioners' second assertion is that the state of the law in other jurisdictions was "nebulous" at the time of the events in question. Remarkably, petitioners point to *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) in support of this argument. *Foster*, however, holds precisely the opposite – that opinion states in no uncertain terms that the right of access was "*clearly established* in 1985-1988." *Id.* at 430 (emphasis added). The only "contours" the *Foster* court found nebulous were those involving the right to proceed free of discovery abuses after the filing of a lawsuit – issues which are plainly not implicated here. *Id.*

The petitioners similarly assert that the D.C. Circuit relied on law that postdated the conduct of the officials sued here. That claim is also wrong. The principal cases upon which the court relied were decided prior to the conduct in question in

this case. *See, e.g.*, *Bell*, 746 F.2d at 1261; *Ryland*, 708 F.2d at 973-75; *Barrett*, 798 F.2d at 575. The court did note that every circuit to have considered the issue at any time has reached the same conclusion. *See* Pet. App. 28a ("Not only have five of our sister circuits held that cover-ups that conceal the existence of a cause of action (or make it difficult to prosecute one) infringe the constitutional right of access to courts, and not only are we unaware of any contrary decision, but we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit."). But the fact that the courts are unanimous in their treatment of this issue – and that the D.C. Circuit so noted – hardly demonstrates that the court misapplied the doctrine of qualified immunity.

IV. NO OTHER COMPELLING REASON EXISTS TO GRANT CERTIORARI IN THIS CASE

Finally, petitioners make the strained argument that review is warranted due to the practical consequences of this ruling – particularly that the decision below will harm U.S. foreign policy and intelligence interests. Pet. at 27-29. Notably, this argument is being made by private counsel for the petitioners because the Government – which has represented the petitioners up to this point – declined to seek review of the decision below.[6] Given that, it is extremely difficult to credit the dire predictions made by the petitioners.

In any event, these claims have no merit. First petitioners

[6]At the time of the events at issue, the petitioners were all government employees. Accordingly, the Government has represented them throughout this litigation. Nonetheless, the Solicitor General's office declined to seek review of the D.C. Circuit's decision.

rehash their argument that the ruling below will lead to a flood of litigation because the court held that anyone who can assert that they once had a right to injunctive relief could immediately bring an access to courts case. As explained above, this contention is wrong. Under the D.C. Circuit's holding the only injunctive claims that can be brought without recourse to state tribunals first are those in which there is no longer the possibility of an adequate remedy through injunctive relief by the time the existence of the cause of action is learned – an extremely narrow subset of cases. *See, e.g.*, Pet. App. 61a-62a ("the opinion will not open the courts to a flood of constitutional access to courts claims" because of the narrowness of the holding).

Second, petitioners renew their argument that the D.C. Circuit opinion "sweeps into its orbit" any cases in which government officials are acting with mixed motivations – that is, where government officials may have sought not only to prevent a lawsuit but also to preserve legitimate national security secrets. Pet. at 28. Again, this overstates the D.C. Circuit's holding. As the court's opinion makes clear, had the petitioners simply refused to answer Ms. Harbury's questions – or had they simply issued a so-called "Glomar" response, refusing to confirm or deny the contended allegation, *see Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) – there would be no basis for any legal claim against them. Only when petitioners went further and deliberately *deceived* Ms. Harbury – and did so, at least in part, to shield themselves from liability – did they subject themselves to potential legal liability. *See* Pet. App. 23a ("Instead of saying (as they could have) that they were unable to discuss Bamaca's situation, they sought to lull her into believing that they were working on her behalf, intending to prevent her from suspecting that the U.S. Government was actually involved in Bamaca's torture. One

of their express objectives, Harbury alleges, was to prevent her from suing them.").

Finally, petitioners argue that as a result of the D.C. Circuit's opinion, government officials will have to weigh the potential risk of legal liabilities when they respond to requests for information "or engage in public discussion on serious topics." They also assert that the fact that the D.C. Circuit has jurisdiction over activities in the Nation's capital will cause a "chilling effect" on the conduct of foreign affairs and intelligence activities. Pet. at 28-29. But that is wrong for two reasons. First, there is no question that the Government remains free to respond to any inquiry with a "Glomar" response, refusing to confirm or deny the contended allegation. Accordingly, nothing in the opinion below remotely requires the Government to volunteer information to all who ask. Instead, it merely applies to situations in which "defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit." Pet. App. 62a.[7] Moreover, as the court noted, although the Government has declined to do so in this case at this juncture, it may always assert a national security defense. *Id.* In short, nothing about this case warrants review.

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[7]In any event, public officials, even those entrusted with our nation's most sensitive national secrets, may not respond to requests for information by engaging in slander, or threatening to blackmail a private citizen, or sexually harassing a subordinate. Petitioners provide no explanation why public officials should be privileged to use their public speech to deprive someone of "the right to sue and defend in the courts." *Chambers*, 207 U.S. at 148.

V. REVIEW WOULD BE PREMATURE

Petitioners seek review of an order that, by its own terms, "resolves some but not all of the claims against some but not all of the parties." *Harbury v. Deutch*, Order and Judgment, August 8, 1999, Pet. App. 60a. Although the District Court entered judgment on the *Bivens* claims that are presently before this Court, the District Court still has before it a number of common law tort claims that arise from the same set of facts and circumstances. Limited jurisdictional discovery on those claims is presently ongoing and the facts to be developed at trial would aid the lower courts – and, if need be, this Court – by ensuring that review takes place on the basis of a fully developed factual record. *See Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our jurisdiction.").

Moreover, as the petitioners have yet to answer Ms. Harbury's complaint in this litigation, they have yet to interpose any defenses they may have to the *Bivens* claims that are the subject of this Petition. The petitioners suggest to this Court that they "might" have engaged in the alleged cover-up in order to protect national security. Pet. at 28. In its ruling *en banc*, however, the D.C. Circuit pointed out that the petitioners had not yet asserted a national security defense to the allegations in Ms. Harbury's complaint, but that they were free to do so when they answered the complaint. Pet. App. 62a. Accordingly, review at this time would be premature.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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